Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	CS Docket No. 96-60
Leased Commercial Access	)	

COMMENTS OF UNITED BROADCASTING CORPORATION, D/B/A TELEMIAMI

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Summary

United Broadcasting Corporation, d/b/a TELEMIAMI, submits these comments in response to the Further Notice of Proposed Rulemaking released by the Commission on March 29, 1996 (the "FNPRM"). TELEMIAMI is a leased access programmer providing Spanish and Portuguese-language programming to the Hispanic community on four cable systems in the Miami area.

TELEMIAMI applauds the Commission's recognition of the flaws in the implicit fee formula, and the Commission's other efforts to address some of the problems faced by leased access programmers. Nevertheless, TELEMIAMI believes that the proposals in the FNPRM fail to take into account the strength of the cable industry's hostility to leased access programming. The FNPRM also fails to consider the degree to which circumstances have changed since the adoption of the Cable Communications Policy Act of 1984.

The Commission has met its obligation to provide for the growth and development of the cable industry. Unfortunately, throughout that period leased access programming has languished. It is now time for the Commission to attend to the other half of the Congressional directive, and promote the growth of leased access as an alternative editorial voice.

The cost/market formula proposed in the FNPRM is an improvement over the implicit fee formula. Nevertheless, we believe that the new formula contains several flaws. First, it appears to overstate the operator's actual operating costs by as much as 14%. Second, the factors proposed for calculating opportunity costs raise a number of questions. We believe

that the computation of opportunity costs will offer operators as much of an opportunity to obstruct leased access programmers as does the implicit fee formula.

For example, the principal component of an operator's opportunity cost under the new formula would be lost advertising revenues. Unfortunately, however, the FNPRM does not specify how those revenues would be determined, and we can foresee many detailed questions that will arise in the course of making and reviewing those computations. In addition, the complexity of that calculation will allow operators to manipulate the results in unforeseeable ways. We fear that this question will prove far more complicated than the Commission anticipates.

We also believe that it is not possible to quantify lost opportunity costs or channels occupied by existing long-term leased access operators, such as TELEMIAMI. Any such attempt would be speculation and would ignore the value added by TELEMIAMI. The fact is that operators sell packages of programming, not individual channels, making any attempt to assign an opportunity cost to a particular channel a fruitless exercise.

Contrary to the FNPRM's proposal, leased access programmers should be given a direct credit for advertising time they give to operators, so that no cash need change hands. To do otherwise would be to preclude long-standing industry practice, in which parties regularly compensate each other with ad "avails." The current proposal would force leased access programmers to pay operators in cash -- this approach will merely disadvantage leased access programmers with respect to operators and other programmers, who do not have to pay anything for carriage.

We concur with a number of the FNPRM's other specific proposals, particularly regarding the treatment of license fees, technical costs, and reductions in tier charges. We are concerned, however, that it will prove difficult to obtain accurate counts of lost commissions from home shopping channels. We also oppose the averaging of per-channel costs. Finally, we do not believe that any opportunity cost should be assigned to dark channels.

We urge the Commission to retain the current classification of leased access channels into three categories. Otherwise, advertiser-supported leased access programmers will be at a great disadvantage, because they do not receive revenue streams comparable to home shopping channels and premium channels. If the categories are not retained, leased access will become dominated by home shopping and adult premium channels, to the exclusion of other types of programming.

We also oppose the creation of special rates for non-profit leased access programmers. Once again, such a decision would discriminate against advertiser-supported leased access programming. There are many other outlets for non-profit programming, but only one for commercial leased access. The solution is to lower leased access rates for all programmers.

Finally, no transition period is required for the implementation of new rates. Operators have had the benefit of high rates for many years and they do not need special relief now.

To address a number of the issues raised by the FNPRM's cost/market rate proposal, we propose an alternative. We believe our presumptive nominal rate approach more accurately reflects the true cost to a cable operator of leased access programming, and counterbalances the operator's total control over the figures needed to compute the rates. We urge the Commission to establish a nominal rate of between $0.01 and $0.05 per subscriber per month as an estimate of the true cost to the operator of carrying a leased access channel.

If an operator believed that its costs justified a higher rate for a particular channel, it could petition the Commission for relief and attempt to rebut the presumption. If, under the cost/market formula, the operator demonstrated that its costs actually did exceed the nominal rate, then the operator could charge the leased access operator the rate calculated under the cost/market formula.

We also believe that the Commission should be prepared to take further steps. If the Commission succeeds in developing a fair mechanism for setting rates, it will find that operators will use other terms and conditions to keep leased access programming off their systems. Therefore, the Commission should order operators not to demand terms from leased access programmers that are more burdensome or expensive to comply with than the terms of any other contract for carriage entered into by the operator.

The Commission is correct in concluding that the programmers should be selected on a first-come, first-serve basis. Operators' discretion should be reduced as much as possible. We also agree that operators should be required to place leased access on the basic tier or the CPS tier with the highest penetration. Only those tiers should qualify as genuine outlets.

We also urge the Commission to allow resale of leased access time.

Finally, we are concerned that the new dispute resolution mechanism will not succeed. It raises a new barrier to leased access programmers because they will have to wait until receipt of the accountant's report -- and possibly pay for its preparation -- to determine whether the operator's rates have been computed correctly -- and even then they cannot necessarily be sure. It is simply unfair to force a programmer to pay for the right to obtain information it is entitled to by law, when another party has total control over the data. Our presumptive nominal rate approach would obviate the need for this provision because rates would only need to be reviewed if an operator requested it.

In conclusion, we urge the Commission to make every effort to promote the growth of leased access. The best way to do that is to impose no more than a nominal fee on leased access programmers, and taking definite steps to ensure operators do not demand unreasonable terms of carriage.

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Introduction

United Broadcasting Corporation, d/b/a TELEMIAMI, submits these comments in response to the Commission's Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking in Leased Commercial Access, CS Docket No. 96-60 (released March 29, 1996) (the "FNPRM"). TELEMIAMI is a leased access programmer providing Spanish and Portuguese-language programming to the Hispanic community on four cable systems in the Miami area.

TELEMIAMI applauds the Commission's recognition of the flaws in the highest implicit fee formula. TELEMIAMI also supports the theory underlying the FNPRM's proposed cost/market rate formula. We also believe, however, that the proposed formula, as well as some of the procedural proposals in the FNPRM, fail to take into account the depth and strength of the cable industry's opposition to leased access programming. The Commission will never reach its goal of fulfilling the intent of the leased access provisions of the Cable Communications Policy Act of 1984, as amended (the "Cable Act"), until it recognizes these facts.

I. THE COMMISSION WILL NEVER MEET CONGRESS'S GOAL OF ESTABLISHING AN ALTERNATIVE TO THE EDITORIAL CONTROL OF THE CABLE OPERATOR, IF IT DOES NOT ENSURE THE AFFORDABILITY OF LEASED ACCESS.

TELEMIAMI is gratified by the Commission's recognition that the current implicit fee formula is seriously flawed, as TELEMIAMI has contended for years. Replacement of the implicit fee formula will be a step in the right direction -- but only a first step. And some of the proposals in the FNPRM remain flawed. The independent leased access industry envisioned by Congress when it passed the Cable Act cannot develop unless the Commission adopts rules ensuring that cable operators charge affordable leased access rates.

The cable industry is opposed to the growth and development of leased access. In the twelve years since leased access was made part of the law, the cable industry has persistently and systematically attempted to smother leased access in its cradle, except in rare circumstances where a particular channel or program suited a particular operator's whim or fancy. Indeed, the implicit fee formula itself was proposed by the cable industry. Unless the Commission recognizes the deeply adversarial -- even ruthless -- attitude of the cable industry towards leased access, and adopts rules that recognize this hostility, leased access has no chance. The Commission must take steps to counter the anticompetitive instincts of the cable industry if it is to comply with the statutory mandate.

Unfortunately, the FNPRM fails to recognize this reality when it refers to balancing the promotion of competition "in the delivery of diverse sources of video programming" against the "growth and development of cable systems." This may have been the case in

1984 -- but twelve years have gone by since the Cable Act was first passed and conditions have changed enormously. The Commission has seen to the second half of the statutory equation. Today the debate is not about balancing the interests of diversity against the growth and health of an embryonic cable industry. It is about a mature industry, possessing enormous market power, preventing another from being born. The growth and development of leased access hardly pose a threat to the cable industry, or to its financial health, growth or development. It is now time for the Commission to acknowledge that the cable industry is hardly in need of protection from the likes of leased access programmers, because the industry already has grown and developed. And it is now time for the Commission to attend to the first half of the Congressional directive and to promote the growth of alternative and diverse editorial voices.

II. THE PROPOSED COST/MARKET RATE FORMULA IS A SIGNIFICANT IMPROVEMENT OVER THE IMPLICIT FEE FORMULA, BUT UNLESS REFINED, IT WILL BE SUBJECT TO ABUSE BY THE CABLE INDUSTRY.

The FNPRM properly recognizes that the current implicit fee rules allow operators to charge vastly inflated rates. Unfortunately, the FNPRM does not adequately recognize that many cable operators engage in evasive practices when potential leased access providers ask for rate information. TELEMIAMI has received rate quotes from operators that clearly did not conform to the Commission's implicit fee formula, and many other potential programmers have had similar experiences.[1] The Commission's current dispute resolution

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[1] In this regard, TELEMIAMI requests that the Commission include in the record in this proceeding, the records in Petition of United Broadcasting Corp., d/b/a TELEMIAMI for Special Relief Against TCI TKR of South Dade, Inc., CSC-366, filed Apr. 8, 1994; and Petition of United Broadcasting Corp., d/b/a TELEMIAMI for Special Relief Against Rifkin/Narragansett South Florida CATV Limited Partnership, d/b/a GoldCoast Cablevision,

mechanism abets this practice, by making it impossible for programmers to verify an operator's rates -- either at all or at best without significant delay and expense. The new opportunity cost formula proposed in the FNPRM is not immune from this problem. Indeed, because the new formula is even more complex than the implicit fee formula, operators will now have an even greater opportunity to play fast and loose with the Commission's rules in calculating their leased access rates, while it will be even more difficult for programmers and the Commission to detect abuses.

For this reason, we propose that the new formula be used only as a vehicle for the operator to overcome a rebuttable preemption in favor of nominal leased access rates. Our presumption proposal is discussed in more detail in Part III below. Here, we address the weaknesses in the proposed cost/market rate formula that should be corrected.

A. The Commission's Assumption that Subscriber Revenue Equals Operating Costs Overstates Operators' Actual Operating Costs.

The Commission has made a critical assumption that builds a substantial profit into the new leased access formula. The Commission assumes that the per-channel revenue an operator receives from subscribers is roughly equivalent to an operator's system operating costs, leading the Commission to conclude that the per channel revenue is a valid proxy for operating costs.

The Commission should keep in mind, however, that subscriber revenues actually exceed -- indeed substantially exceed -- system costs. As the FNPRM itself notes (at footnote 115), cable operators' cost-of-service filings made at the Commission demonstrate

CSR-4261-L, filed May 31, 1994. TELEMIAMI incorporates by reference the facts and arguments it made in those proceedings.

that subscriber revenues exceed average operating costs by 14%. This means that the Commission has built into its proposed formula a 14% margin over operating costs, even before lost opportunity costs are included. Because opportunity costs generally include a return on investment component -- that is, they include the lost opportunity to invest in other activities -- the Commission has granted operators an even higher return on investment than 14%.[2] Thus, the new formula overstates an operator's costs, even before other factors are considered.[3] For this reason, the Commission is entitled to look at cable operator's opportunity cost claims with greater skepticism, and to require operators to carry the burden of substantiating those costs.

B. The Calculation of Opportunity Costs Proposed in the FNPRM, Is Too Easily Manipulated and Too Difficult to Verify.

The Commission's proposed opportunity cost formula is logical in theory. In practice, however, the calculation of opportunity costs will be extremely complicated to perform and just as difficult to verify. The Commission will soon find itself either repeatedly amending the rules to provide specific guidance on many points, or reviewing numerous complaints to decide issues on a case-by-case basis. The Commission should avoid this administrative burden by adopting TELEMIAMI's presumptive nominal rate proposal instead. (<u>See</u> Part III, <u>infra</u>.) By allowing operators to rebut the presumptive nominal rates by submitting evidence establishing that they incur higher opportunity costs, the burden will

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[2] Even 14% is high by Commission standards. The Commission has allowed operators a maximum rate of return of 11.25% in connection with subscriber equipment and installation rates.

[3] In addition, we note that it is unfair to leased access programmers to require them to pay any portion of an operator's operating costs, when no other type of programmer does so.

be placed where it belongs -- on the party with unique access to the relevant information. The following discussion illustrates problems with a number of aspects of the Commission's opportunity costs proposal as currently structured.

1. Lost Advertising Revenues.

The Commission states that lost advertising revenues would be a "quantifiable opportunity cost" both in the case of moving existing programming to a new channel, and in the case of placing new programming on a dark channel. There are several flaws with this element of the proposal. First, it is far from clear that advertising revenues are as readily quantifiable as the Commission claims. Second, the Commission does not address TELEMIAMI's case: a programmer that has been carried continuously for many years. Third, the proposal does not allow programmers to provide the operator with free advertising time, rather than cash, to offset an operator's "lost" advertising revenues.

This last point is critical: Programmers typically provide an operator only with advertising time -- not cash. This is obviously preferable from a cash-strapped start-up programmer's viewpoint. If, unlike other start-up programmers, leased access programmers were required to pay the supposed liquidated cash value of advertising comp time provided by the displaced programmer, the leased access provider would be worse off -- and the cable operator better of -- than in the case of the displaced programmer.

The Commission does not state how it expects to calculate the advertising revenues allocable to a particular channel. This raises a number of questions:

- Will the Commission look solely at actual revenues received by the operator, and if so, only on the channel that is being displaced?

- How will the Commission treat revenues from an advertiser for advertising carried on more that one channel?
- Will advertising revenues for carriage on multiple channels be allocated equally among all channels? Pro rata according to the viewership of each channel? Or according to the valuation given by the advertiser or the operator itself to advertising carried on a particular channel?
- Is the Commission prepared to order recalcitrant operators to provide such highly sensitive business information, and if so, is it prepared to do so in a timely manner, so operators cannot win the war by delaying until the programmer has given up?
- Will the Commission include only cash receipts as advertising revenues?
- If not, how will the Commission determine the value of in-kind compensation received by the operator?
- If the Commission will not look at actual revenues, how will it calculate lost advertising opportunity costs?
- Does the Commission intend to look at advertising rate card rates? If so, will the Commission discount those rates to reflect the fact that the rates are negotiable and are frequently discounted -- particularly from lesser viewed channels, the ones most likely to be displaced?
- Once again, how will the Commission value in-kind compensation, such as ad "avails," which are typically given as compensation for some service provided to the operator?

- How will those avails be valued in light of the fact that requiring leased access programmers to pay cash instead of giving ad avails is inherently more onerous and disadvantageous than the non-cash ad avails given by displaced programmers?

Thus, the question of how to quantify advertising revenues is by no means simple or trivial. We submit that the Commission is not prepared to deal with the day-to-day details of the cable industry to this degree, and would be better off adopting a simpler, more straightforward method of computing rates. At a minimum, the leased access provider should only be required to match what the displaced programmers provided -- advertising comp time and not cash unless the programmer paid cash.

In addition, we do not believe lost opportunity costs are quantifiable when dealing with a dark channel. If the operator has not seen fit to put programming on the channel, possibly for years before the leased access programmer came along, it is illogical to claim that opportunity costs can be quantified to any degree at all. Any revenue the operator gets from leasing a previously dark channel is by definition an increase over what it was receiving before, and any speculation about what the operator might receive if it put a different non-leased access channel on in the future is just that -- pure speculation. And experience proves that if operators are allowed to speculate in deriving leased access rates, they will be creative indeed in deriving speculatively high rates.

The same is true in TELEMIAMI's case. We have been on the air since 1988 -- any attempt to assign a value to any lost revenue opportunity on any of the four channels we are currently on would be nothing more than sheer speculation. The operators have no historical track record on which to estimate the advertising revenues they might receive from our channels. Indeed, in two cases the operators currently have the right to sell advertising spots on TELEMIAMI, but to date have never bothered to do so. Surely this is a more accurate indicator of the lost opportunity cost than any speculation based on some hypothetical alternative channel.

The Commission should bear in mind that operators sell large packages of programming, not individual channels, and they do not sell every available second of advertising time on all their channels. To the contrary, operators often may sell little or nor advertising on some channels, but want the channels in their service packages to attract certain types of subscribers. Thus, operators often do not place any significant value on a particular channel, and so have no opportunity costs. They are more concerned with the loss of control over that channel and the resulting loss of programming flexibility with respect to the entire package. But that is not necessarily the same thing as opportunity cost, and in any case it is extremely difficult to quantify.

Finally, if the Commission were to attempt to quantify foregone advertising revenue, it would have to give programmers a credit for advertising time they provide to operators. If advertising revenue is as easily quantifiable as the Commission believes, allowing such a credit would ensure that the time is valued in accordance with the same rules the Commission adopts for valuing advertising avails granted by the cable operator. In addition -- and more important -- it allows for a direct comparison. If operators are concerned about lost opportunity costs, they should not complain about being given an equivalent opportunity on a channel with different programming. In fact, if the operator receives sufficient advertising time, the programmer should not have to pay any fee at all.

The FNPRM's approach, in contrast, would allow operators to tell programmers that "The FCC's rules don't allow us to accept advertising time in setting the monthly rate -- you have to pay us in cash, up front." If the Commission doubts that operators will do this, it should consider how many times operators have told programmers, after quoting the maximum permissible rate under the implicit fee formula, that the Commission's rules set the rate, and then refused to negotiate any lower rate, despite the fact that the Commission's rules make it clear that lower rates can be negotiated.

Cash is the lifeblood of any business, and ad avails are commonly used in the cable programming business to compensate customers and vendors because programmers and broadcasters generally have more advertising time than they can sell. If operators are allowed to insist on estimated liquidated cash values of ad avails (even though the do not do so for non-leased access programmers), operators will use that request to increase their cash flows at the leased access programmer's expense, leaving these programmers more cash-strapped than all other programmers on the system. This is not the way to ensure the long-term growth of alternative editorial voices. The Commission should not deviate from long-standing industry practice, and should explicitly allow ad avails to be treated as credits.

2. Lost Commissions.

We agree entirely with the Commission's decision to treat program license fees as a cost savings that reduce an operator's opportunity costs. We have long advocated this position before the Commission, and are pleased that the Commission has recognized that payment of license fees constitute a major difference between nonleased access programming and leased access programming.

We are concerned, however, about how lost commissions from home shopping channels will be counted. We are particularly skeptical about the willingness of operators to disclose such information, and predict that it will become a major source of conflict if adopted. Once again, we believe that while the Commission's approach may be attractive to an economist, it may not prove practical in the business world.

3. Technical Costs.

We do not object to paying reasonable technical costs incurred by an operator that are required to accommodate a programmer. But programmers should be responsible for only those technical costs that are truly new and incremental costs to the particular leased access programmer. Programmers should not be responsible for all technical costs allocable to a channel, or special technical support for which the operator may charge separately.

4. Reduction in Tier Charge.

We completely agree with the Commission's tentative conclusion that subscriber loss cannot be measured accurately and that the Commission should not attempt to account for any reduction in tier charges that might ostensibly result from replacing programming with leased access programming. In addition, if the Commission were to introduce this concept, it would also have to allow leased access programmers to reap the benefits of any possible increases in viewership that might result from the introduction of a particular leased access channel or program. Furthermore, this question gets perilously close to assessing the content of a channel. Not only does this raise First Amendment concerns, but the Cable Act intended leased access to promote the introduction of different editorial viewpoints. If operators can set leased access rates based on their subjective assessment of the value of a particular channel's programming, the central purpose of the leased access requirements would be undermined.

5. Dark Channels.

We have already addressed the treatment of dark channels in the discussion of advertising above. The Commission is simply wrong to attempt to assign any opportunity cost at all to dark channels. This especially the case when one considers that for twelve years operators have had a statutory set-aside requirement, and they have known what that requirement is. In a world in which leased access channels were ordinarily occupied, a rational operator would assign no value to those channels based on any of its own programming, because it would know that if they were to become vacant, another leased access programmer would show up to fill it and the operator would never have the opportunity to put its own programming on. Thus, there would be no opportunity cost other than the leased access rate itself. Since the leased access rules have not been implemented effectively, the situation is somewhat different today, but the fact remains that each operator is -- and has been -- subject to the set-aside requirement, which it may be required to fulfill at any time. This is especially so for dark channels, because if an operator has a dark channel, it has no excuse for denying carriage to a leased access programmer that is willing to meet all the operator's terms and conditions.

6. Averaging of Per-Channel Costs.

We do not believe that the per-channel costs for all designated channels should be averaged by the operator. As discussed in Part III below, we believe that there should be a presumptive nominal rate, and the opportunity cost rate mechanism should come into play only if the operator seeks to rebut the presumption by coming forward with detailed evidence supporting its calculations.

The Commission's averaging proposal is inherently unfair to current leased access programmers because they will be forced to pay higher costs than they are actually imposing on the operator. The averaging mechanism will mean that the first leased access programmer on a system will have to pay a portion of costs attributable to other, higher cost channels. In addition, averaging premium channels and home shopping channels with advertiser-supported channels will be the death knell for advertiser-supported entertainment and educational leased access programmers. If home shopping and premium channels are included in averaging, the result will be that only home shopping and adult programmers will be able to afford to be leased access programmers.

The solution is to charge everybody the presumptive low nominal fee rather than creating complicated formulas based on data uniquely in the control of -- and subject to manipulation by -- the cable operator.

C. To Replicate the Market, the Commission Must Maintain Different Categories of Programming Because Different Types of Leased Access Programming Have Different Costs and Revenue Structures.

The Commission must distinguish between advertiser-supported programmers, premium channels and home shopping channels. Recognizing these distinctions simply reflects industry practice. Each of those types of programmers represents a very different business with its own unique cost structures and revenue sources. This affects each class of programmer's cash flows and its ability to compete with other classes. Home shopping channels, for example, have unique revenue streams that are not available to advertiser-supported channels like TELEMIAMI. Thus, they can afford to pay operators larger amounts simply because they have the cash. BET and Discovery, for example, do not pay cable operators like HSN and QVC.

If the Commission does not retain these distinctions, it will in the process be promoting the growth of home shopping channels and premium adult channels, fostering the conversion of leased access channels into nothing but home shopping and adult outlets. This is not the type of diversification of viewpoints the Cable Act is intended to promote.

D. Leased Access Rates Should Only Be Adjusted When Permitted by the Terms of a Contract.

This is not a fit subject for regulation. Cable operators have sufficient leverage that they can negotiate rate increases if they desire them. Once an operator enters into a contract with a programmer, that relationship should be bound only by that contract. Costs change in business all the time; that is one of the risks of doing business, and it is one that businesses are well-equipped to handle in the course of their negotiations. The Commission should let the free market work to the degree it can, by allowing the parties to agree to terms of longer than one year, with or without lease rate escalations, depending on the bargain they strike with each other. If the Commission is too rigid in this regard, it may inadvertently forbid certain arrangements that would benefit one party or the other in a particular situation and make it easier to reach agreement. Therefore, leased access rates should be set when the parties enter into an agreement and should only be adjusted when a contract calls for an adjustment.

E. No Transition Period to the New Rate Structure is Required.

We agree with the Commission that no transition period is required for the implementation of any new rules the Commission may adopt. The cable industry has had 12 years to adjust to leased access. No transition period is required now.

We also believe that no transition period is required, regardless of whether adding a leased access programmer will require an operator to move or delete existing programming from its line-up. Operators have effectively escaped their leased access obligations for years. Now that the Commission proposes to take a few steps in the right direction, it makes no sense to be concerned about "penalizing" operators or their chosen programmers for the operator's past decisions. Will the Commission require cable operators to use the difference between the transition period rates and the rates under the new rules to reimburse leased access programmers that have overpaid in the past? Only then would a phase-in period make any sense.

It also bears mentioning that all of the cable operator's chosen programmers have been aware of the leased access obligations for years, and their agreements with operators are inherently subject to the requirements of Section 612, whether the parties explicitly so noted in the contract or not. Programmer claims of hardship ring hollow when compared to the plight leased access programmers have faced for over a decade. And if these programmers truly believe that the new leased access formula is so advantageous, they will always be free to become leased access programmers themselves. We doubt many will choose to do so.

F. Nonprofit Entities Should Not Be Given a Preference for Leased Access Channels.

Nonprofit entities already have numerous outlets for their programming and other advantages. Cable operators are required to carry public broadcasting stations and, in most communities, public, educational and governmental (PEG) access channels. We support such programming and encourage the Commission and cable operators to do the same. Nevertheless, commercial leased access is just that: <u>commercial</u> leased access. Congress did not require operators to set aside nonprofit leased access channels. Therefore, we see no justification in the statute for giving nonprofit entities a preference over commercial, for-profit leased access programmers.

In particular, we object to any proposal for setting a lower maximum rate for not-for-profit leased access programmers. We agree that rates are too high -- but they are too high for <u>all</u> leased access programmers, profit and non-profit alike. The Commission should spend its time trying to lower overall rates, not setting up a narrow class of exemptions. That approach, if successful, would make leased access more affordable for both profit and non-profit programmers.

III. THE COMMISSION SHOULD ESTABLISH A PRESUMPTIVE NOMINAL RATE THAT AN OPERATOR HAS THE BURDEN OF REBUTTING BASED ON ACTUAL DATA.

As discussed above, there will be many practical problems in administering the cost/market formula proposed in the FNPRM. We also believe that the proposal overstates the true cost of carrying a leased access programmer and treats leased access programmers as if they impose substantially different and greater costs on cable operators than do other programmers. Finally, the FNPRM fails to take adequate account of the fact that the operator is in sole control of all the information needed to calculate leased access rates under the cost/market formula. The result will be a system in which leased access programmers continue to be faced with unreasonably high rates, while still being unable to adequately verify the accuracy of the rates.

TELEMIAMI proposes an approach that would compensate operators for the true cost of carrying leased access programming, without imposing unfair burdens on leased access programmers. Under this method, the Commission would establish a nominal rate that presumptively covers operators' costs. An operator would have the right to challenge the nominal rate and rebut the presumption with respect to a particular channel using the cost/market formula, by providing the Commission with cost data showing that the actual cost of carrying the channel, including operating costs and opportunity costs, exceeded the nominal rate. If successful, the operator would be allowed to set a rate higher than the nominal rate with respect to that channel.

This proposal is fair to operators because they would be reimbursed for actual costs, and it is fair to programmers because they would not overpay, nor would they be forced to choose between accepting rates that they could not verify and paying for an accountant or further review at the Commission.

The nominal rate should be enough to cover the incremental costs of carrying a programmer, bearing in mind that the operator will still be receiving per-channel revenue from subscribers. As discussed above, that revenue is more than enough to cover the